

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Criminal Justice

BILL: SB 824
 INTRODUCER: Senator Garcia
 SUBJECT: Public Records/Forensic Behavioral Health Evaluation
 DATE: March 12, 2013 REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Clodfelter	Cannon	CJ	Favorable
2.	_____	_____	GO	_____
3.	_____	_____	RC	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

I. Summary:

SB 824 makes forensic behavioral health evaluations filed with the court pursuant to ch. 916, F.S., confidential and exempt from public records requirements.

The bill specifies that the exemptions are subject to the Open Government Sunset Review Act and provides a statement of public necessity for the exemptions as required by the Florida Constitution. The bill specifies that the exemptions stand repealed October 2, 2018, unless reviewed and saved from repeal through reenactment by the Legislature.

Because the bill creates new public records exemptions, the bill requires a two-thirds vote of each house of the Legislature for passage.

This bill creates section 916.1065 of the Florida Statutes.

II. Present Situation:

Forensic Mental Health¹

Forensic Services

Chapter 916, F.S., addresses the treatment and training of individuals who have been charged with felonies and found incompetent to proceed to trial due to mental illness, mental retardation, or autism, or who are acquitted by reason of insanity.

¹ Much of the information included in this portion of the analysis is from the Interim Report by the Senate Committee on Children, Families, and Elder Affairs, *Forensic Hospital Diversion Pilot Program* (Oct. 2010). The report is available at <http://www.flsenate.gov/Committees/InterimReports/2011/2011-106cf.pdf> (last visited March 12, 2013).

Department of Children and Family Services

Part II of ch. 916, F.S., relates to forensic services for persons who are mentally ill and describes the criteria and procedures for the examination, involuntary commitment, and adjudication of persons who are incompetent to proceed to trial due to mental illness or who have been adjudicated not guilty by reason of insanity. Persons committed under ch. 916, F.S., are committed to the custody of the Department of Children and Family Services (DCF).

Section 916.12(3), F.S., authorizes the court to appoint experts to evaluate a criminal defendant's mental condition. In determining whether a defendant is competent to proceed, the examining expert must provide a report to the court regarding the defendant's capacity to appreciate the charges or allegations against him, appreciate the range and nature of possible penalties, understand the adversarial nature of the legal process, consult with counsel, behave appropriately in court, and testify relevantly. A defendant must be evaluated by at least two experts prior to being involuntarily committed.² A defendant charged with a felony who is found incompetent to proceed may be involuntarily committed if the court finds by clear and convincing evidence: (1) that the defendant is mentally ill; (2) all available, least restrictive alternatives are inadequate; and (3) there is a substantial probability that the mental illness will respond to treatment and that the defendant will be restored to competency.³

DCF provides mental health assessment, evaluation, and treatment of individuals who are committed following adjudication as incompetent to proceed or not guilty by reason of insanity. These individuals are charged with a felony offense and must be admitted to a treatment facility within 15 days of the department's receipt of the commitment packet from the court.⁴

Agency for Persons with Disabilities

The Agency for Persons with Disabilities (APD) provides forensic services to defendants charged with a felony who have been found incompetent to proceed due to retardation or autism. Defendants with retardation or autism must be evaluated by at least one expert with expertise in evaluating persons with retardation or autism in order to evaluate the mental condition of the defendant.⁵ A defendant is considered incompetent to proceed if the expert finds that the defendant:

- Meets the definition of retardation or autism;
- Does not have the sufficient present ability to consult with his or her attorney with a reasonable degree of rational understanding; and
- Has no rational and factual, understanding of the proceedings.⁶

If the expert finds that the defendant is incompetent to proceed due to the defendant's retardation or autism, the expert must prepare a report for the court recommending training for the defendant in order to attain competency.⁷ Individuals charged with a felony and found incompetent to

² s. 916.12(2), F.S.

³ s. 916.13(1), F.S. *See also*, s. 916.302, F.S.

⁴ *See* s. 916.107(1)(a), F.S.

⁵ s. 916.301, F.S.

⁶ s. 916.3012, F.S.

⁷ s. 916.3012(4), F.S.

proceed due to retardation or autism are committed to APD for appropriate training.⁸ In certain circumstances, the court may order the conditional release of a defendant found incompetent to proceed due to retardation or autism based on an approved plan for providing community-based training.⁹

Restoration of Competency

Competency restoration is designed to help defendants meaningfully participate in their own defense. If the court determines that the defendant is a danger to himself or others, it may involuntarily commit the defendant to a secure forensic facility.¹⁰ If the court finds that the defendant does not pose a risk to public safety, it may place the defendant on conditional release to receive competency restoration training in the community¹¹

A defendant who is committed or placed on conditional release pursuant to ch. 916, F.S., is returned to court periodically for a review and report on his or her condition.¹² Generally, a review is conducted:

- No later than 6 months after the date of admission;
- At the end of any extended period of commitment;
- At any time upon the facility administrator's communication to the court that the defendant no longer meets commitment criteria; and
- Upon counsel's Motion for Review having been granted.

Once a defendant is determined to have regained his or her competence to proceed, the court is notified and a hearing is set for the judge to determine the defendant's competency.¹³ If the court finds the defendant to be competent, the criminal proceeding resumes. If, however, the court finds the defendant incompetent to proceed, the defendant is returned to a forensic facility or community restoration on conditional release until competency is restored.¹⁴

Public Records Law

The State of Florida has a long history of providing public access to governmental records. The Florida Legislature enacted the first public records law in 1892.¹⁵ One hundred years later, Floridians adopted an amendment to the State Constitution that raised the statutory right of access to public records to a constitutional level.¹⁶ Article I, Section 24(a), of the Florida Constitution, provides that:

⁸ s. 916.302, F.S.

⁹ s. 916.304, F.S.

¹⁰ s. 916.13, F.S.

¹¹ s. 916.17, F.S.

¹² ss. 916.13(2), 916.15(3) and 916.302(2)(a), F.S. See also s. 985.19(4)(e), (5) and (6), F.S., related to the court's jurisdiction and reporting requirements in juvenile cases.

¹³ Rule 3.212, Fla.R.Crim.P.

¹⁴ *Id.*

¹⁵ ss. 1390 & 1391, F.S. (Rev. 1892), concerning records to be kept by the Clerk of Circuit Court. Section 1390 list the types of records and includes the following statement: "Such records shall always be open to the public, under the supervision of the clerk, for the purpose of inspection thereof and of making extracts therefrom, but the clerk shall not be required to perform any service in connection with such inspection or making of extracts without payment of the compensation fixed by law." Section 1391 lists other records and includes a substantively identical statement.

¹⁶ Article I, Section 24, of the Florida Constitution.

Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

The Public Records Act, ch 119, F.S., specifies conditions under which public access must be provided to records of an agency.¹⁷ Section 119.07(1)(a), F.S., states that every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public record.

Unless specifically exempted, all agency records are available for public inspection. The term “public record” is broadly defined to include all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.¹⁸

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge.¹⁹ All such materials, regardless of whether they are in final form, are open for public inspection unless made exempt.²⁰

Only the Legislature is authorized to create exemptions to open government requirements.²¹ Exemptions may be created by general law if approved by a two-thirds vote of the members present and voting in each house of the Legislature.²² The law must state with specificity the public necessity justifying the exemption and be no broader than necessary to accomplish the stated purpose of the law.²³ A bill enacting an exemption²⁴ may not contain other substantive provisions, although it may contain multiple exemptions that relate to one subject.²⁵

¹⁷ The word “agency” is defined in s. 119.011(2), F.S., as any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency.

¹⁸ s. 119.011(12), F.S.

¹⁹ See *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980).

²⁰ See generally *Wait v. Florida Power & Light Company*, 372 So.2d 420 (Fla. 1979).

²¹ Article I, Section 24(c), of the Florida Constitution.

²² *Id.*

²³ *Id.*

²⁴ Under s. 119.15(4)(b), F.S., an existing exemption may be considered a new exemption if the exemption is expanded to cover additional records.

²⁵ Article I, Section 24(c), of the Florida Constitution.

There is a difference between records that the Legislature has made exempt from public inspection and those that are confidential and exempt. If the Legislature makes a record confidential and exempt, such information may not be released by an agency (the custodian of the record with the power to receive or communicate the record) to anyone other than to the persons or entities designated in the statute.²⁶ If a record is simply made exempt from disclosure requirements then an agency is not prohibited from disclosing the record in all circumstances.²⁷

The Open Government Sunset Review Act (Act)²⁸ provides for the systematic review, through a 5-year cycle ending October 2 of the 5th year following enactment, of an exemption from the Public Records Act or the Sunshine Law (public meetings).²⁹ Each year, by June 1, the Office of Legislative Services is required to certify to the President of the Senate and the Speaker of the House of Representatives the language and statutory citation of each exemption scheduled for repeal the following year.³⁰ The Act requires the automatic repeal of such exemption on October 2nd of the fifth year after creation or substantial amendment, unless the Legislature reenacts the exemption.³¹

The Act states that an exemption may be created, revised, or maintained only if it serves an identifiable public purpose and if the exemption is no broader than necessary to meet the public purpose it serves.³² An identifiable public purpose is served if the exemption meets one of three specified criteria and if the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption:

- Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption.
- Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals, cause unwarranted damage to their good name or reputation, or would jeopardize their safety. (Only information that would identify such individuals may be exempted under this provision).
- Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.³³

The Act also requires, as part of the review process, that the Legislature consider the following:

- What specific records or meetings are affected by the exemption?

²⁶ Attorney General Opinion 85-62.

²⁷ *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA 1991), *review denied*, 589 So.2d 289 (Fla. 1991).

²⁸ s. 119.15, F.S.

²⁹ s. 286.011, F.S.

³⁰ s. 119.15(5)(a), F.S.

³¹ s. 119.15(3), F.S.

³² s. 119.15(6)(b), F.S.

³³ *Id.*

- Whom does the exemption uniquely affect, as opposed to the general public?
- What is the identifiable public purpose or goal of the exemption?
- Can the information contained in the records or discussed in the meeting be readily obtained by alternative means? If so, how?
- Is the record or meeting protected by another exemption?
- Are there multiple exemptions for the same type of record or meeting that it would be appropriate to merge?³⁴

III. Effect of Proposed Changes:

The bill creates s. 916.1065, F.S., to make forensic behavioral health evaluations filed with the court pursuant to ch. 916, F.S., confidential and exempt from public records requirements. The term “forensic behavioral health evaluation” is defined in the bill as meaning:

[A]ny record, including supporting documentation, derived from a competency, substance abuse, psychosexual, psychological, psychiatric, psychosocial, cognitive impairment, sanity, or other mental health evaluation of an individual.

The types of records included in the bill are already afforded confidentiality pursuant to s. 916.107(8), F.S., if they become a clinical record. The bill recognizes that in such cases, release of the records is governed by the provisions of that subsection.

The bill specifies that the exemptions are subject to the Open Government Sunset Review Act and provides the following statement of public necessity for the exemptions as required by the Florida Constitution:

The Legislature finds that it is a public necessity that forensic behavioral health evaluations filed with the court pursuant to chapter 916, Florida Statutes, be confidential and exempt from disclosure under public records requirements. The personal health of an individual and the treatment he or she receives is an intensely private matter. An individual’s forensic behavioral health evaluation should not be made public merely because it is filed with the court. Protecting forensic behavioral health evaluations is necessary to consistently protect the health care privacy rights of all persons. This exemption applies during all judicial proceedings unless such records are released as provided by law. This exemption is limited and no broader than necessary to accomplish the stated purpose.

The bill specifies that the exemptions stand repealed October 2, 2018, unless reviewed and saved from repeal through reenactment by the Legislature.

Because the bill creates new public records exemptions, the bill requires a two-thirds vote of each house of the Legislature for passage.

The bill takes effect upon becoming a law.

³⁴ s. 119.15(6)(a), F.S.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

Vote Requirement

Article I, Section 24(c), of the Florida Constitution requires a two-thirds vote of the members present and voting in each house of the Legislature for passage of a newly-created public records exemption. Because the bill creates new public records exemptions, the bill requires a two-thirds vote of each house of the Legislature for passage.

Public Necessity Statement

Article I, Section 24(c), of the Florida Constitution requires a public necessity statement for a newly created public records exemption. Because this bill creates new public records exemptions, it includes a public necessity statement.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

- B. **Amendments:**

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
